114 (3) 10-27-08

No. 08-245

IN THE SUPREME COURT OF THE UNITED STATES

STATE OF KANSAS, Petitioner,

v.

LACEY RANA SMITH, Respondent.

On Petition for a Writ of Certiorari to the Kansas Supreme Court

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BRIEF IN OPPOSITION

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Respondent Lacey Rana Smith respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the opinion of the Kansas Supreme Court in this case.

Reasons for Denying the Writ

1. Petitioner did not raise the issue presented in its petition in the lower courts.

Both at the state trial court and in the state appellate courts, the State of Kansas only argued that officers did not seize Ms. Smith and, therefore that the Fourth Amendment was not implicated in any way. At the state district court, the prosecutor argued that the "the State's contention that this contact with Ms. Smith does not rise to the level of seizure, was a voluntary encounter with Officer Gail between him and Ms. Smith, and the consent given was free of duress or coercion." Feb. 13, 2006 Transcript at 16. The prosecutor conceded that it did not have reasonable articulable suspicion of criminal activity on the part of Ms. Smith. Feb. 13, 2006 Transcript at 16. The state trial court held, *without objection*, that, if the stop constituted a *Terry* stop, it

> must be limited in it's duration and nature to the surrounding circumstances that justify the original stop to begin with. That being the duration can't be longer than what would be necessary to complete the underlying basis for the stop. And the questions asked and the investigative techniques used must be designed to basically verify or dispel the circumstances of the original stop. [Feb. 13, 2006 Transcript at 26.]

The state trial court went on to hold that the encounter was a *Terry* stop and "the question was beyond the scope allowed for a Terry detention." Feb. 13, 2006 Transcript at 31.

In its interlocutory appeal, the State of Kansas did not dispute the holding regarding the application of a scope limitation during an investigatory detention. The State of Kansas only argued that "The district court was incorrect when it concluded that appellee had been seized by law enforcement when the driver of the vehicle in which she was a passenger was being detained for traffic offense." Appellant Br. at 3 (statement of issue). The bulk of the State of Kansas'

argument dealt with its assertion that the encounter did not amount to a *Terry* stop and therefore did not implicate the Fourth Amendment. In passing, the State of Kansas did argue in the alternative that "[i]f defendant was seized, that seizure did not run afoul of the concerns addressed in *State v. Damm*, 246 Kan. 220, 787 P 2d 1185 (1990). The seizure did not exceed reasonable scope and duration." Appellant Br. at 13. Again, the State of Kansas state did not contest the law that there is a scope limitation during a *Terry* stop.

The Kansas Court of Appeals agreed with the district court that Ms. Smith had been seized by law enforcement. See Pet. App. 32a. But the Kansas Court of Appeals held, sua sponte, that *Muehler v. Mena*, 544 U.S. 93 (2005) changed the law regarding the scope limitation during a *Terry* stop and, therefore, it was permissible for Officer Gail to question Ms. Smith about matters unrelated to the purpose of the traffic stop. Pet. App. 34a. The State of Kansas did not respond to Ms. Smith's petition for review to the Kansas Supreme Court.

The Kansas Supreme Court granted review of the Kansas Court of Appeals' decision. The State of Kansas did not file a supplemental brief in the Kansas Supreme Court addressing the scope question and, in fact, waived oral argument in the Kansas Supreme Court. *See* Kansas Appellate Court Docket. As a result, the issue presented in the State of Kansas' petition before this Court has never been presented to the state trial or appellate courts.

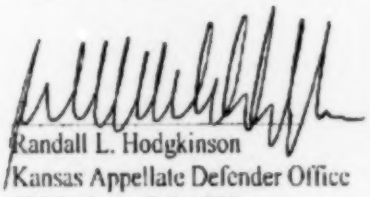
Respondent recognizes that for purposes of this Court's jurisdiction, if the lower court considers and disposes of a federal question, it may be irrelevant whether the parties properly presented the question. *See Orr v. Orr*, 440 U.S. 268, 274-75 (1979). But the fact that the state has never sought to litigate this issue in state court provides evidence that this case is a poor vehicle to resolve the question. Even if this Court *can* reach the issue, the failure to argue the

issue to the Kansas Supreme Court, even after it was decided by the Kansas Supreme Court provides a prudential basis for denying the writ in this case.

Conclusion

Because the precise issue presented to this Court has never been pressed by the State of Kansas in the lower courts, this case is a poor vehicle for certiorari review. This Court should deny the petition.

Respectfully submitted,



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